Oral argument granted

PD-0963-19

In the Texas Court of Criminal Appeals

Harry Donald Nicholson, Jr.

Petitioner-Appellant

vs.

The State of Texas

Respondent-Appellee

From the Tenth Court of Appeals,
Case 10-18-00360-CR

Appeal from the Thirteenth District Court
in Navarro County, Case D37996-CR

Petitioner-Appellant's Initial Brief

Gary Udashen
State Bar No. 20369590
gau@udashenanton.com

Brett Ordiway
State Bar No. 24079086
brett@udashenanton.com

Udashen Anton
2311 Cedar Springs Road,
Suite 250
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)

Counsel for Petitioner-Appellant

Identity of Parties and Counsel

The trial court:

The Thirteenth District Court in Navarro County
The Honorable James Lagomarsino

For Appellant Harry Donald Nicholson, Jr.:

Trial counsel of record:

Shana Faulhaber
10000 North Central
Expressway,
Suite 400
Dallas, Texas 75231

Appellate counsel of record:

Gary Udashen
Brett Ordiway
Udashen Anton
2311 Cedar Springs Road,
Suite 250
Dallas, Texas 75201

For Appellee the State of Texas:

Trial counsel of record:

W. Thompson
Robert Koehl
Navarro County District
Attorney's Office
300 West 3rd Avenue
Corsicana, Texas 75110

Appellate counsel of record:

Robert Koehl
Navarro County District
Attorney's Office
300 West 3rd Avenue
Corsicana, Texas 75110

Emily Johnson-Liu
State Prosecuting
Attorney's Office
P.O. Box 13046
Austin, Texas 78711

Table of Contents

Index of Authorities

Statement of the Case

A Navarro County jury found Harry Nicholson guilty of evading arrest with a vehicle. CR: 120; *see* Tex. Pen. Code § 38.04(b)(2)(A). He appealed to the Tenth Court of Appeals, explaining that the evidence is legally insufficient to support his conviction because the evidence is legally insufficient to show that he knew that a Corsicana Police Officer was lawfully detaining him, as required by the plain language of the evading-arrest statute. *See Nicholson v. State*, 2019 WL 4203673, at *2 (Tex. App.—Waco 2019). Nicholson also set forth two grounds explaining that the jury charge was reversibly erroneous. *See id.* at *1.

The court of appeals held that the trial court reversibly erred in failing to instruct the jury that it needed to find that Nicholson knew he was being detained. *Id.* As to the sufficiency of the evidence, however, the court held that even if the State had to prove that Nicholson knew he was being lawfully detained, the State did. *Id.* at *2-7. In light of these holdings, the court did not address whether the State was required to prove as much. *Id.* at *1-7.

The court did not speak unanimously. In a dissenting opinion, Chief Justice Tom Gray explained that this case presented a "square[]

confront[ation] with" an issue "that has not yet been directly addressed" by this Court, but "that has been percolating in the Courts of Appeals and is now ripe for review and decision": "the impact of a change in the wording of [the evading-arrest] statute." *Id.* at *9 (Gray, CJ., dissenting). Chief Justice Gray concluded that the evading-arrest statute indeed obligated the State to prove that Nicholson knew he was being lawfully detained and that the State had not. *Id.* at *9-11 (Gray, CJ, dissenting). Chief Justice Gray thus would have entered a judgment of acquittal. This Court granted review.

Issues Presented

1. Whether the plain language of the evading-arrest statute requires proof of knowledge that the attempted arrest or detention is lawful.
2. Whether it matters in this case; whether the evidence is legally insufficient to show that Nicholson knew he was being lawfully detained.

Statement of Facts

A Corsicana convenience-store clerk noticed that a man later identified as Nicholson had sat in his truck in the parking lot for some three hours. RR12: 31-34, 47. The clerk called 911, and Corsicana Police Officer Alexander Layfield was dispatched for a welfare check. RR12: 31-34.

Officer Layfield quickly determined that Nicholson was fine. RR12: 73-74, 77. But after running Nicholson's license number and learning that he was wanted in another county for evading arrest and suspecting that Nicholson had littered, Officer Layfield attempted to detain Nicholson (standard practice was to wait for backup before formally arresting Nicholson). RR12: 65-66. Officer Layfield did not explain why. As he affirmed at trial, he did not give Nicholson "any articulable basis for detainment" because he believed he didn't "have to." RR12: 81.

Nicholson fled in his truck from the attempted unexplained detention. RR12: 84-85. A backup officer was just arriving, however, and drove in front of Nicholson. SX11; RR12: 67-68, 103-04, 111. After Ni-

cholson unsuccessfully attempted to squeeze through an opening between the officer's SUV and a parking-lot bollard, officers dragged the then-pinned Nicholson out of his truck. SX11; RR12: 112.

Summary of the Arguments

Argument One

The plain language of the evading-arrest statute requires proof of the accused's knowledge that the attempted arrest or detention is lawful. *See* Tex. Pen. Code § 38.04(a) ("A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him.") The statute requires proof of knowledge of the words on both sides of "lawfully." *See, e.g., Duvall v. State*, 367 S.W.3d 509, 511 (Tex. App.—Texarkana 2012, pet. ref'd). And "[l]awfully" is not set off by any punctuation. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012). The State's aversion to detained people "play[ing] lawyer" does not justify reading the statute as requiring knowledge of all but one word embedded within a phrase. RR13: 32; *see, e.g., Ex parte Levinson*, 160 Tex. Crim. 606, 608, 274 S.W.2d 76, 78

(1955). Nor do the intermediate-court opinions holding that it's not necessary for the State to prove that the defendant knew that the detention was lawful—they rely on this Court's opinion in *Hazkell v. State*, 616 S.W.2d 204, 205 (Tex. Crim. App. 1981), decided when the evading-arrest statute was worded differently. *See, e.g., Loewe v. State*, No. 03-10-00418-CR, 2011 WL 350462, at *3 (Tex. App.—Austin Feb. 2, 2011, pet. ref'd, untimely filed). The State was required to show that Nicholson knew his detention was lawful.

Argument Two

The State did not prove that Nicholson knew his detention was lawful. Though the court of appeals reasoned that, at the time of the attempted detention, Nicholson had committed at least four crimes—"littering, fail[ing] to present a valid Texas driver's license, [ ] outstanding warrants," and "possess[ing] contraband in the form of glass pipes that are usually used in the consumption of drugs"—the glass pipes were found inside the center console of the vehicle and not until *after* Nicholson's ultimate arrest. *See Nicholson*, 2019 WL 4203673 at *6; RR12: 135-36. The State presented no evidence that Nicholson knew there

were warrants out for his arrest. *See* RR12: 65-66. And although Nicholson did not have his driver's license, he gave Officer Layfield his license number, and Officer Layfield confirmed that Nicholson had a valid license. RR12: 21, 80. The only obvious basis for detention thus would have been littering, and a person's not likely to expect to be warrantlessly arrested for Class C-misdemeanor littering. *See* Tex. Code Crim. Pro. art. 14.06(b). And in fact, Officer Layfield was not attempting to detain Nicholson for littering—he was attempting to detain him on the basis of the outstanding warrants. RR12: 65.

Because Officer Layfield did not give Nicholson "any articulable basis for detainment," there is thus insufficient evidence that Nicholson knew he was being lawfully detained. RR12: 81. This Court should enter a judgment of acquittal.

Arguments

1. The plain language of the evading-arrest statute requires proof of knowledge that the attempted arrest or detention is lawful.

Section 38.04(a) of the Texas Penal Code provides that "[a] person commits an offense if he intentionally flees from a person he knows is a

peace officer or federal special investigator attempting lawfully to arrest or detain him." *See* Tex. Pen. Code § 38.04(a). Lots of courts have held that it's not necessary for the State to prove that the defendant knew that the detention was lawful, but these cases rely on this Court's opinion in *Hazkell v. State*, 616 S.W.2d 204, 205 (Tex. Crim. App. 1981). *See, e.g., Loewe v. State*, No. 03-10-00418-CR, 2011 WL 350462, at *3 (Tex. App.—Austin Feb. 2, 2011, pet. ref'd, untimely filed); *Johnson v. State*, No. 13-05-00648-CR, 2007 WL 1021413, at *2 (Tex. App.—Corpus Christi Apr. 5, 2007, no pet.); *Etheridge v. State*, No. 08-12-00337-CR, 2014 WL 4952804, at *3 (Tex. App.—El Paso Oct. 1, 2014, no pet.); *see also Jackson v. State*, 718 S.W.2d 724, 729 (Tex. Crim. App. 1986). And when *Hazkell* was decided, the evading-arrest statute was different. Back then, it proscribed "intentionally flee[ing] from a person [one] knows is a peace officer attempting to arrest him." It wasn't until 1993 that the statute was changed to require knowledge that the person fled from "is a peace officer attempting *lawfully* to arrest or detain him." *See* Penal Code, 1993 Tex. Sess. Law Serv. Ch. 900 (S.B. 1067). This Court has never "directly addressed" the "impact of [the] change in the word-

ing," but the issue "has been percolating in the Courts of Appeals." *Nicholson*, 2019 WL 4203673 at *9 (Gray, CJ., dissenting).

"[A] significant change in [statutory] language" ordinarily "is presumed to entail a change in meaning." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012). And here, only by skipping over the word "lawfully" can the significantly changed statute be read as not requiring knowledge that an arrest or detention is lawful. The statute requires proof of knowledge of the words on both sides of "lawfully": (1) that the person from whom fled is a police officer and (2) that the officer is attempting to arrest or detain. *See, e.g., Duvall v. State*, 367 S.W.3d 509, 511 (Tex. App.—Texarkana 2012, pet. ref'd) ("A defendant's knowledge that a police officer is trying to arrest or detain him or her is an essential element of the offense of evading arrest."). And "[l]awfully" is not set off by any punctuation. *See* Scalia & Garner, *supra* ("Punctuation is a permissible indicator of meaning.") (citing *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993)). Why, then, wouldn't the statute require knowledge of the word in between "is a peace officer . . . attempting" and "to arrest or detain him"? *See* Tex. Pen. Code § 38.04(a)

("A person commits an offense if he intentionally flees from a person he knows is a peace officer . . . attempting lawfully to arrest or detain him."). As Professors Dix and Schmolesky observe in their treatise, it was only "[u]nder the prior version of evading arrest" that "an instrument charging [the] offense was not required to allege that the accused knew or was reckless or criminally negligent with regard to whether the arrest was lawful." George E. Dix & John M. Schmolesky, 42 Tex. Prac., Criminal Practice and Procedure § 25:87 (3d ed.).

Maybe, as the State argued at trial, we don't want detained people to "get to play lawyer"; "to say, awe, well, you haven't read me my rights yet, or you haven't done this yet, or whatever yet so I get to run from you and it's not fleeing." RR13: 32. But if the State disapproves of the statute as written, it should encourage the legislature to rewrite it. The State's disapproval does not justify reading the statute as requiring knowledge of all but one word embedded within a phrase. *See, e.g., Ex parte Levinson*, 160 Tex. Crim. 606, 608, 274 S.W.2d 76, 78 (1955) ("It must be kept in mind, also, that in construing a statute or in seeking to ascertain the legislative intent in enacting a statute, the courts must not enter the field of legislation and write, rewrite, change, or add to a

law."); *Stockton v. Offenbach*, 336 S.W.3d 610, 619 (Tex. 2011) (a court is not free to rewrite a statute in the guise of construing it); *see also Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("…it is for Congress, not this Court, to rewrite the statute.").

When this Court interprets a statute, it "focus[es its] attention on the literal text of the statute" and "attempt[s] to discern the fair, objective meaning of that text at the time of its enactment." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). This Court "read[s] the statute as a whole," "look[ing] to the statute's literal text," "construe[ing] the words according to rules of grammar and usage," "and give[s] effect to the plain meaning of the statute's language[ ] unless the statute is ambiguous or the plain meaning leads to absurd results." *Hughitt v. State*, 583 S.W.3d 623, 626–27 (Tex. Crim. App. 2019). "Construing a statute according to its plain import is not 'absurd' merely because [appellate jurists]"—much less the State—"do not favor that construction." *Bingham v. State*, 913 S.W.2d 208, 212 (Tex. Crim. App. 1995).

The evading-arrest statute does not say that "a person commits an offense if he intentionally flees from a person he knows is a peace officer

attempting to arrest or detain him *and* the arrest or detention is lawful." It says that "[a] person commits an offense if he intentionally flees from a person [he] knows is a peace officer . . . attempting lawfully to arrest or detain him." Tex. Pen. Code § 38.04(a). The State was thus required to show that Nicholson knew his detention was lawful.

2. It matters in this case because the evidence was legally insufficient to show that Nicholson knew he was lawfully detained.

The Waco court's majority opinion avoided this issue because the court concluded that, in any event, the evidence is legally sufficient to show that Nicholson knew he was lawfully detained. Though Officer Layfield affirmed that he did not give Nicholson "any articulable basis for detainment"—he believed he didn't "have to"—the court concluded that Nicholson "knew or should have known that he was subject to a lawful arrest." RR12: 81; *Nicholson*, 2019 WL 4203673, at *6; *see also* SX10. At the time of the attempted detention, the court reasoned, Nicholson had committed at least four crimes: "littering, fail[ing] to present a valid Texas driver's license, [ ] outstanding warrants," and "possess[ing] contraband in the form of glass pipes that are usually used in the consumption of drugs." *Nicholson*, 2019 WL 4203673, at *6.

As the court acknowledged, however, the glass pipes were found inside the center console of the vehicle—not in plain view—and not until *after* Nicholson's ultimate arrest. *See id.*; RR12: 135-36. The State presented no evidence that Nicholson knew there were warrants out for his arrest. *See* RR12: 65-66 (detaining officer explaining why it was "important . . . to wait until [he] had a backup officer before disclosing to Mr. Nicholson that there was a warrant for his arrest"). And although Nicholson did not have his driver's license, he gave Officer Layfield his license number, and Officer Layfield confirmed that Nicholson had a valid license. RR12: 21, 80. Nicholson thus would have had no reason to infer that he was being detained for possessing drug paraphernalia, on outstanding warrants, or for failing to present a valid driver's license. *Cf. Nicholson*, 2019 WL 4203673 at *6. The only obvious basis for detention, then, would have been littering.

To be sure, littering is a criminal offense. *See* Tex. Health & Safety Code § 365.012. And a law enforcement officer is authorized to arrest anyone for any offense committed in the officer's view. Tex. Code Crim. Pro. art. 14.01. But a person's not likely to expect to be warrantlessly arrested for Class C-misdemeanor littering. Article 14.06 of the

Code of Criminal Procedure explicitly provides for a citation to be issued. *See* Tex. Code Crim. Pro. art. 14.06(b) ("A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person…"). And in fact, Officer Layfield was not attempting to detain Nicholson for littering—he was attempting to detain him on the basis of the outstanding warrants. RR12: 65. Even if "the jury could rationally infer from the evidence that Nicholson committed the aforementioned offenses," then, the jury could not rationally infer that he knew or should have known that he was being arrested for them—in other words, that he was being lawfully arrested. *Nicholson*, 2019 WL 4203673 at *6. And because Officer Layfield did not give Nicholson "any articulable basis for detainment," there is thus, as Chief Justice Gray concluded, insufficient evidence that Nicholson knew he was being lawfully detained. RR12: 81; *see Nicholson*, 2019 WL 4203673 at *11 (Gray, CJ., dissenting).

The court of appeals should not have merely reversed Nicholson's

conviction. This Court should enter a judgment of acquittal. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (entering judgment of acquittal on holding of legally insufficient evidence).

3. Conclusion

Because the plain language of the evading-arrest statute requires proof of knowledge that the attempted arrest or detention is lawful and because Officer Layfield never explained why he was detaining Nicholson, the evidence is insufficient to support the jury's guilty verdict.

Prayer

Nicholson respectfully requests this Court reverse the court of appeals's judgment and enter a judgment of acquittal.

Respectfully submitted,

/s/ Gary Udashen

Gary Udashen
State Bar No. 20369590
gau@udashenanton.com

Brett Ordiway
State Bar No. 24079086
brett@udashenanton.com

Udashen Anton
2311 Cedar Springs Road, Suite 250
Dallas, Texas 75201
(214)-468-8100
(214)-468-8104 (fax)

Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that, concurrent with this document's electronic filing, it was electronically served to Assistant State Prosecuting Attorney Emily Johnson-Liu at emily.johnson-liu@spa.texas.gov and Navarro County Assistant District Attorney Robert Linus Koehl at rkoehl@navarrocounty.org.

/s/ Gary Udashen
Gary Udashen

Certificate of Compliance

Relying on the word count of the computer program used to prepare the document, I hereby certify that this document contains 2,691 words (excluding the parts of the document exempted by Tex. R. App. P. 9.4(i)(1)), complying with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B).

/s/ Gary Udashen
Gary Udashen